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Date:
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LEGEND:

Taxpayer =

State X =

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Dear :

This ruling responds to a letter dated November 26, 2013, and subsequent correspondence, submitted on behalf of Taxpayer. Taxpayer owns or leases indoor and outdoor small cellular telephone systems ("Systems"). Taxpayer has requested the

following rulings in connection with Taxpayer's intent to elect to be taxed as a real estate investment trust ("REIT") under § 856 through § 860 of the Internal Revenue Code:

(1) The fiber optic cable used in indoor and outdoor Systems, coaxial cable used in indoor Systems, and related conduit piping (collectively, the "System Components"), qualify as "real property" for purposes of § 856 of the Code;

(2) Taxpayer's rights to use real property owned by others for the System Components and other items in its Systems (collectively and as more fully defined below, the "Property Interests") qualify as "interests in real property" under § 856(c)(5)(C); and

(3) Subject to § 856(d)(1)(C), amounts received by Taxpayer for the use of the System Components and the related Property Interests qualify as "rents from real property" under § 856(d)(1). The provision by Taxpayer of the Tenant Services does not give rise to impermissible tenant service income, and will not cause any portion of the rents received by Taxpayer from Tenants for use of the System Components and the related Property Interests to fail to qualify as "rents from real property" under § 856(d).

FACTS

Taxpayer is a publicly traded State X corporation that intends to elect to be treated as a REIT beginning with its taxable year ending on Date 1.

A segment of Taxpayer's overall business involves the leasing of Systems to wireless communications providers ("Tenants"). Each System consists of the System Components, other items, and the Property Interests. The fiber optic cable and the Property Interests are the primary components of each System.

The Systems allow wireless carriers to provide enhanced cellphone service to customers in high-density locations where it is not possible to provide sufficient capacity or coverage through traditional cell towers and rooftop sites. The Systems are generally located outdoors; however, some of the Systems are located indoors in a building or other host venue (e.g., a stadium) (hereinafter referred to collectively as "building").

Taxpayer enters into agreements with the Tenants pursuant to which Taxpayer grants a Tenant the right to use a System for the Tenant's telecommunications signals. These agreements typically have initial terms ranging from a to b years (in many cases with one or more Tenant options to extend the term). Tenants pay Taxpayer a fixed, recurring amount that may escalate periodically.

System Components

When a customer of a wireless carrier places a call in an area served by a System, an antenna within the System receives a radio frequency signal from the caller's cellphone. The signal is then transported via coaxial cable to an optical converter. The optical converter converts the electrical signal into an optical signal, which then flows through strands of fiber optic cable to a base station. Equipment at the base station converts the optical signal back into an electrical signal. The electrical signal passes through coaxial cable to other base station equipment, and through this other base station equipment to the wireless carrier's cellular network. When a wireless carrier's customer receives a call (or when a customer's call is answered), the process is reversed.

Taxpayer owns the antennas in both indoor and outdoor Systems. Optical converters in outdoor Systems are, with limited exceptions, owned by the Tenants. Because of the limited space available for indoor Systems it is not practical to have multiple Tenants each supply their own optical converter, so Taxpayer owns the shared optical converters for indoor Systems. Taxpayer owns the metal equipment cabinets that house the optical converters in outdoor Systems. Tenants own the base station equipment in both indoor and outdoor Systems. Taxpayer owns the coaxial cable in both indoor and outdoor Systems. Taxpayer generally owns the fiber optic cable in both indoor and outdoor Systems. In limited circumstances, rather than own a fiber optic cable outright, Taxpayer holds an exclusive and "indefeasible right to use" ("IRU") certain strands of fiber optic cable owned by third parties. An IRU typically lasts for a fixed period of time (e.g., c years), often with the possibility of renewals, after which the right to use the relevant strands reverts to the third-party owner of the cable. The conduit piping through which the fiber optic cable and indoor System coaxial cable is run may be owned by Taxpayer or may be owned by a third-party that grants Taxpayer a right to use space in the conduit piping for purposes of installing Taxpayer's fiber optic cable.

Taxpayer has requested a ruling with respect to the System Components, that is, the fiber optic cable used in indoor and outdoor Systems, coaxial cable used in indoor Systems, and related conduit piping. Taxpayer has not requested a ruling with respect to the antennas, optical converters, metal equipment cabinets, base station equipment, and outdoor coaxial cable; Taxpayer has represented that it intends to treat these other items as personal property for purposes of REIT qualification.

In an outdoor System, the antenna, coaxial cable, optical converter, and equipment cabinet are each affixed to a structure (typically, a utility or street light pole). The optical converter is housed in a metal equipment cabinet. The base station equipment is typically located in a building, shed, or other structure (which may be a number of miles away). Fiber optic cable, which runs from the optical converter to the base station, may be either buried in the ground (including in conduit piping that is buried in the ground) or installed above ground (typically strung between telephone or

electric poles). Once installed, the fiber optic cable is intended to remain in place for the entirety of its useful life (generally, b to d years or longer).

In an indoor System, each antenna is affixed to a wall or ceiling, or mounted behind the panels of a ceiling. The optical converters and base station equipment are typically located inside the building in an equipment room or closet; however, if there is insufficient space within the building, the equipment may be located in a shed or similar structure adjacent to the building. The coaxial cable and fiber optic cable generally are embedded within the walls, ceilings, or floors of the building, and may run down elevator shafts and through crawl spaces. Generally cables are bundled with other wiring in the building and may be run through conduit piping that is permanently embedded within the walls, ceiling, or floor of a building. Cables are not tacked to the exterior of walls, strung along floors or ceilings, or otherwise exposed. To ensure safety of the public and to protect the integrity of indoor cabling, cables are only exposed if a particular situation requires it, and then only for as short a distance as possible. Where the cables are visible, they are integrated with the structural components of the related building. For example, a cable that runs from one end of a stadium to the other end may run through conduit piping that is located in the rafters or permanently affixed to a catwalk. Similarly, if a portion of a cable that is otherwise embedded in walls or ceilings must be run outside an interior wall of the building, that portion will usually be contained in a conduit pipe that is bolted to the wall or ceiling, or whose ends are embedded in the wall or ceiling. Thus, in terms of location and method of affixation, Taxpayer's coaxial and fiber optic cables are integrated into the building in the same manner as the other wiring (e.g., electrical) or cabling in the building. The length of both the coaxial cable and fiber optic cable generally range from e to f feet.

An indoor System installed at a site with multiple buildings (e.g., a college campus) is one large System connected by fiber optic cable to a single base station. The fiber optic cable that connects each building to the base station is typically buried in the ground in a manner similar to outdoor Systems. Fiber optic cable that runs outdoors typically enters or exits the building's floor or basement using the same conduits used for the other wiring or cabling in the building. If the building's existing conduits are unavailable or congested, Taxpayer installs separate conduit for the fiber optic cable.

Taxpayer represents that because of the degree to which the indoor coaxial and fiber optic cables are integrated with the buildings in which they are housed, it is extremely difficult, costly, and damaging to the related building to remove these cables. As a result, the coaxial and fiber optic cables are in fact rarely, if ever, removed. The conduit piping through which fiber optic cable and indoor coaxial cable is run is also extremely difficult and expensive to remove, especially in the case of directionally bored conduit and trenched conduit used in outdoor Systems. Removing fiber optic and indoor coaxial cables from a conduit without removing the conduit itself is slightly easier, but even this process is difficult and expensive and is unlikely to ever occur for any particular fiber optic or indoor coaxial cable. Moreover, when Taxpayer holds an IRU for

certain strands of fiber optic cable that are owned by third parties, individual strands of fiber optic cable cannot be removed from the cable of which they are a part.

Taxpayer represents that, with very rare exceptions, the System Components have not been moved to a new location and cannot be moved without incurring prohibitive expense. The System Components are only moved to be replaced at the end of their useful lives. The System Components are designed to remain in place indefinitely. At the time of installation, the System Components are not expected to ever be moved to a different location. Because of the manner in which the System Components are attached to the ground, building, or other inherently permanent structure, removal of any such component is likely to cause irreparable damage to the component rendering that component useless in other locations. Removing the System Components in an indoor System would be extremely damaging to the building. Fiber optic cable in outdoor systems is buried deep in the ground or affixed to other inherently permanent structures. Taxpayer is not required to remove the System Components at the expiration of the Property Interests in the real property to which the components are affixed. Removing the System Components would represent a major endeavor and would be extremely costly.

Property Interests

Taxpayer generally does not own the poles or other structures to which the System Components are affixed, nor does Taxpayer own the land or the buildings in which the System Components are located. In addition, in some circumstances Taxpayer does not own the fiber optic cable that it uses in its Systems or the conduit piping through which that cable or indoor coaxial cable is run. Instead, Taxpayer holds interests that generally take the form of easements, licenses, rights of way, "attachment rights," and other rights to occupy the land or structures to which the System Components are affixed, as well as, in limited circumstances, IRUs for specific strands of fiber optic cable, and the right to use space in conduit piping (collectively, the "Property Interests"). In exchange for the Property Interests, Taxpayer typically pays the owner of the applicable property (or holder of a leasehold interest therein) a fixed, recurring, and periodic payment and, in some cases (generally with respect to indoor Systems), may make payments to the owner that are based on the Taxpayer's gross revenues from leasing the System that uses one or more of the Property Interests in the owner's property.

Taxpayer represents that it currently treats and will treat IRUs as either fee ownership of the underlying strands of fiber optic cable or a leasehold interest in those strands, depending on the nature of the IRU.

Tenant Services

Under its lease agreements with Tenants, Taxpayer may be obligated to furnish certain services that Taxpayer represents are usually and customarily provided in connection with leasing telecommunications infrastructure similar to the Systems. The usual and customary services performed by Taxpayer include certain services provided in designing Systems (as discussed below), overseeing the construction of Systems by third party contractors, providing Tenants access to electrical power or submetering electricity to power the System Components and other items in Systems that require electricity, providing ongoing monitoring of the functioning of Systems (i.e., ensuring that Systems are actually working, as opposed to monitoring and adjusting the System Components or other items in Systems for optimal performance), periodic inspections of the System Components and other items in Systems and, if needed, minor repair work on the System Components (all such services, the “Tenant Services”).

Taxpayer represents that any design services are not unique to a particular Tenant, but rather, are provided to all Tenants to ensure that the Systems provide sufficient functionality to meet both current and future Tenants’ needs. The design process is necessary to ensure that a System can serve the basic purpose for which it is constructed and leased—to allow existing and future Tenants to lease space adequate to provide the desired level of coverage to their customers.

In addition, Taxpayer represents that the Tenant Services are performed to prepare a System for lease by a Tenant and to ensure that the System is operational, and remains safe and secure. Taxpayer represents that because a System may be leased to several different Tenants, the Tenant Services cannot, as a practical matter, be performed by the Tenants. Taxpayer represents that the electricity costs are passed through to its Tenants with only a small mark-up to compensate Taxpayer for invoicing and other administrative expenses associated with paying the utility. Taxpayer represents that any services provided to its customers other than the Tenant Services will be performed by taxable REIT subsidiaries of the Taxpayer or by independent contractors from whom Taxpayer derives no income (e.g., Taxpayer will hire an independent contractor to make major repairs to the System). Taxpayer may charge a Tenant a separately stated charge for the performance of the Tenant Services or, alternatively, the charge may be built into the periodic rent paid by the Tenant.

Although a specific System may have more than one Tenant and the Property Interests and conduit piping for the System Components may benefit multiple Tenants, each Tenant’s lease specifies the strands of fiber optic cable that are reserved for that Tenant’s sole use and those strands are not shared with other Tenants. The coaxial cable in indoor Systems, however, is typically shared by Tenants.

LAW AND ANALYSIS

Issue 1: System Components

Section 856(c)(4)(A) provides that at the close of each quarter of its taxable year, at least 75 percent of the value of a REIT's total assets must be represented by real estate assets, cash and cash items (including receivables), and Government securities.

Section 856(c)(5)(B) provides that the term "real estate assets" means real property (including interests in real property and interests in mortgages on real property) and shares (or transferable certificates of beneficial interest) in other REITs that meet the requirements of § 856 through § 859.

Section 1.856-3(b) of the Income Tax Regulations provides, in part, that the term "real estate assets" means real property. Section 1.856-3(d) provides that the term "real property" means land or improvements thereon, such as buildings or other inherently permanent structures thereon (including items which are structural components of such buildings or structures). In addition, the term "real property" includes interests in real property. Local law definitions will not be controlling for purposes of determining the meaning of "real property" for purposes of § 856 and the regulations thereunder. The term "real property" includes, for example, the wiring in a building, plumbing systems, central heating or central air-conditioning machinery, pipes or ducts, elevators or escalators installed in a building, or other items which are structural components of a building or other permanent structure. The term does not include assets accessory to the operation of a business, such as machinery, printing press, transportation equipment which is not a structural component of the building, office equipment, refrigerators, individual air-conditioning units, grocery counters, furnishings of a motel, hotel, or office building, even though such items may be termed fixtures under local law.

Rev. Rul. 69-94, 1969-C.B. 189, addresses whether properties of a railroad, including land with improvements or other inherently permanent structures situated thereon, which may be under, along, or adjacent to certain lines of the railroad, and including the tracks, roadbed, buildings, bridges and tunnels of the railroad, are real property for purposes of § 856. The revenue ruling holds that the railroad properties owned by a trust that are leased to another corporation are not "assets accessory to the operation of a business" within the meaning of § 1.856-3(d), but are "real estate assets" within the meaning of § 856(c).

Rev. Rul. 75-424, 1975-2 C.B. 269, considers whether certain assets used in connection with the transmission and reception of microwave signals qualify as "real property" for purposes of § 856. The ruling concludes that the building, the heating and air conditioning system, the transmitting and receiving towers, and the chain link fencing are "real estate assets" within the meaning of § 856(c)(5)(B). The antennae, waveguides, transmitting, receiving, multiplex equipment, and prewired modular racks are "assets accessory to the operation of a trade or business" and therefore not "real estate assets" within the meaning of § 856(c)(5)(B).

In this case, the System Components are designed to be parts of the larger Systems to which they are attached. It is extremely difficult, costly, and damaging to move any of the System Components. The System Components are intended to function indefinitely and remain in place once installed. Similar to the tracks and other railroad components described in Rev. Rul. 69-94, the System Components form a passive conduit that allows a Tenant's signal to flow through the System. The System Components do not include any machinery or equipment that generates, transforms, transmits, or receives a signal.

Based upon the information submitted and representations made, we conclude that the System Components are inherently permanent structures that are not assets accessory to the operation of a business. Accordingly, the System Components qualify as real property for purposes of § 856.

Issue 2: Property Interests

Section 856(c)(5)(C) provides that the term "interests in real property" includes fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon, but does not include mineral, oil, or gas royalty interests.

Section 1.856-3(b)(1) provides that the term "real estate assets" means real property, interests in mortgages on real property (including interests in mortgages on leaseholds of land or improvements thereon), and shares in other qualified REITs. Section 1.856-3(c) provides that the term "interests in real property" includes fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon.

Rev. Rul. 68-291, 1968-1 C.B. 351, clarifying Rev. Rul. 59-121, 1959-1 C.B. 212, provides generally that the consideration received for the granting of an easement constitutes the proceeds from the sale of an interest in real property and should be applied as a reduction of the cost or other basis of the portion of the land subject to the easement. See also Rev. Rul. 54-575, 1954-2 C.B. 145. An easement is an interest in real property.

Similarly, leases are included in the term "interests in real property" for purposes of § 1.856-3(c). Although licenses, rights of way, attachment rights, and IRUs do not convey fee ownership in the real property to which they relate, they are similar to leases in that they authorize the holders to use the applicable real property for similar specified terms in a manner analogous to that of leases.

Accordingly, based upon the information submitted and representations made, we conclude that the Property Interests qualify as interests in real property for purposes of § 856(c)(5)(C).

Issue 3: Tenant Services

Section 856(c)(2) provides that at least 95 percent of a REIT's gross income must be derived from, among other sources, rents from real property. Section 856(c)(3) provides that at least 75 percent of a REIT's gross income must be derived from, among other sources, rents from real property.

Section 856(d)(1) provides that "rents from real property" include (subject to exclusions provided in § 856(d)(2)): (A) rents from interests in real property; (B) charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated; and (C) rent attributable to personal property leased under, or in connection with, a lease of real property, but only if the rent attributable to the personal property for the taxable year does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, the lease.

Section 1.856-4(a) defines the term "rents from real property" generally as the gross amounts received for the use of, or the right to use, real property of the REIT. Section 1.856-4(b)(1) provides that the term "rents from real property" includes charges for services customarily furnished or rendered in connection with the rental of real property, whether or not the charges are separately stated. Services furnished to tenants of a particular building will be considered as customary if, in the geographic market in which the building is located, tenants in buildings of similar class are customarily provided with the service. Where it is customary, in a particular geographic marketing area, to furnish electricity or other utilities to tenants in buildings of a particular class, the submetering of utilities to tenants in such buildings will be considered a customary service.

Section 1.856-4(b)(5)(ii) provides that the trustees or directors of a REIT are not required to delegate or contract out their fiduciary duty to manage the trust itself, as distinguished from rendering or furnishing services to the tenants of its property or managing or operating the property. Thus, the trustees or directors may do all those things necessary, in their fiduciary capacities, to manage and conduct the affairs of the trust itself.

Section 856(d)(2)(C) provides that any impermissible tenant service income is excluded from the definition of "rents from real property." Section 856(d)(7)(A) defines "impermissible tenant service income" to mean, with respect to any real or personal property, any amount received or accrued directly or indirectly by the REIT for services

furnished or rendered by the REIT to tenants at the property, or for managing or operating the property.

Section 856(d)(7)(C) provides certain exceptions from impermissible tenant service income. Section 856(d)(7)(C) provides that for purposes of § 856(d)(7)(A), services furnished or rendered, or management or operation provided, through an independent contractor from whom the REIT does not derive or receive any income or through a taxable REIT subsidiary of the REIT shall not be treated as furnished, rendered, or provided by the REIT, and there shall not be taken into account any amount which would be excluded from unrelated business taxable income under § 512(b)(3) if received by an organization described in § 511(a)(2).

Section 512(b)(3) provides, in part, that there shall be excluded from the computation of unrelated business taxable income all rents from real property and all rents from personal property leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

Section 1.512(b)-1(c)(5) provides that payments for the use or occupancy of rooms and other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, motor courts or motels, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rent from real property. Generally, services are considered rendered to the occupant if they are primarily for the occupant's convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, and the collection of trash are not considered as services rendered to the occupant.

In Rev. Rul. 2002-38, 2002-2 C.B. 4, a REIT pays its taxable REIT subsidiary (TRS) to provide noncustomary services to tenants. The REIT does not separately state charges to tenants for the services. Thus, a portion of the amounts received by the REIT from tenants represents an amount received for services provided by the TRS. TRS employees perform all of the services and TRS pays all of the costs of providing the services. The TRS also rents space from the REIT for carrying out its services to tenants. The revenue ruling concludes that the services provided to the REIT's tenants are considered to be rendered by the TRS, rather than the REIT, for purposes of § 856(d)(7)(C)(i). Accordingly, the services do not give rise to impermissible tenant service income and do not cause any portion of the rents received by the REIT to fail to qualify as "rents from real property" under § 856(d) of the Code.

Each Tenant obtains the exclusive right to use one or more separate, dedicated fiber optic strands in a System. The System Components and the related Property Interests are real property for purposes of § 856. Therefore, amounts received by Taxpayer for use of the System Components and the related Property Interests qualify as “rents from real property” under § 856(d)(1). Based upon the information submitted and representations made, the Tenant Services are usually and customarily provided in connection with the rental of telecommunications infrastructure similar to the Systems or represent an exercise of the fiduciary duties of the Taxpayer’s directors in accordance with § 1.856-4(b)(5)(ii). Accordingly, the provision by Taxpayer of the Tenant Services does not give rise to impermissible tenant service income, and will not cause any portion of the rents received by Taxpayer from Tenants for use of the System Components and the related Property Interests to fail to qualify as “rents from real property” under § 856(d).

CONCLUSIONS

Based on the facts and representations submitted by Taxpayer, we rule that:

- (1) The System Components qualify as “real property” for purposes of § 856;
- (2) The Property Interests qualify as “interests in real property” under § 856(c)(5)(C); and
- (3) Subject to § 856(d)(1)(C), amounts received by Taxpayer for the use of the System Components and the related Property Interests qualify as “rents from real property” under § 856(d)(1). The provision by Taxpayer of the Tenant Services does not give rise to impermissible tenant service income, and will not cause any portion of the rents received by Taxpayer from Tenants for use of the System Components and the related Property Interests to fail to qualify as “rents from real property” under § 856(d).

This ruling’s application is limited to the facts, representations, Code sections, and regulations cited herein. Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed concerning whether Taxpayer otherwise qualifies as a REIT under subchapter M, part II of Chapter 1 of the Code.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

K. Scott Brown
Branch Chief, Branch 3
Office of Associate Chief Counsel
(Financial Institutions & Products)

Enclosures:

Copy of this letter
Copy for section 6110 purposes